UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

VINAL R. CROCKER,	***)***	
	)	
Petitioner	***)***	
	)	
v.	***)***	***Civil No. 95-210-B***
	)	
MAINE DEPARTMENT OF CORRECTIONS,	***)***	
	)	
	)	
Respondent	***)***	

RECOMMENDED DECISION ON PETITION FOR WRIT OF HABEAS CORPUS

The *pro se* petitioner seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in connection with his murder conviction following a jury trial in the Maine Superior Court (Penobscot County) in February 1980. He bases his petition on numerous asserted violations of rights secured by the confrontation and due process clauses of the Sixth and Fourteenth Amendments to the United States Constitution. For the reasons set forth below, I recommend that the court deny the petition.

I. Background

On November 24, 1978 Martha Crocker brought her five-year-old son Timothy to the emergency room of St. Joseph's Hospital in Bangor, Maine. *State v. Crocker*, 435 A.2d 58, 62 (Me. 1981). Timothy was comatose, having suffered an injury to the right side of his head which was covered with bruises. *Id.* Both eyes and much of his body were deeply bruised. *Id.* There were various scrapes, abrasions and burn marks on his body. *Id.* His heels and other parts of his body had pressure sores, apparently from being bedridden without attention for an extended period. *Id.* He was severely malnourished and dehydrated, conditions consistent only with a lengthy period of food

deprivation and several days of water deprivation. *Id.*

Timothy never regained consciousness; he died on December 5, 1978. *Id.* An autopsy found the cause of death to be a combination of starvation and the head injury. *Id.* The petitioner was indicted[1] on a single count charging two alternative forms of murder: intentional or knowing killing under 17-A M.R.S.A. § 201(1)(A),[2] and "depraved indifference" killing under 17-A M.R.S.A. § 201(1)(B).[3] Indictment. In the first phase of a bifurcated trial a jury found the petitioner guilty of murder. *Crocker*, 435 A.2d at 62. In the second phase the presiding justice, sitting without a jury, ruled that the petitioner had failed to sustain his burden of proving that he lacked criminal responsibility within the meaning of 17-A M.R.S.A. § 58(1).[4] *Id.* The Law Court upheld the

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[1] The indictment also charged the petitioner's wife, Martha Crocker, with manslaughter. Indictment, *State v. Crocker*, No. 79-2 (Me. Super. Ct., Pen. Cty., Jan. 3, 1979). On the petitioner's motion the Superior Court (Penobscot County) severed Vinal's trial from Martha's. *Crocker*, 435 A.2d at 62 n.1. Martha was convicted in a separate proceeding on the manslaughter charge, but the Law Court vacated her conviction. *State v. Crocker*, 431 A.2d 1323, 1325 (Me. 1981) (presiding justice failed to instruct jury that state had to prove beyond a reasonable doubt that death would not have occurred but for defendant's conduct). She subsequently pleaded guilty and received a fifteen-year prison sentence. Docket Sheet, *State v. Crocker*, No. 79-2 (Me. Super. Ct., Pen. Cty., Nov. 30, 1981).

[2] A person is guilty of murder under section 201(1)(A) if he or she "intentionally or knowingly causes the death of another human being."

[3] A person is guilty of murder under section 201(1)(B) if he or she "engages in conduct which manifests a depraved indifference to the value of human life and which in fact causes the death of another human being."

[4] When the petitioner was tried, section 58 read:

> An accused is not criminally responsible if, at the time of the criminal conduct, as a result of mental disease or defect, he either lacked substantial capacity to conform his conduct to the requirements of the law, or lacked substantial capacity to appreciate the wrongfulness of his conduct.
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> . . .

(continued...)

petitioner's conviction on appeal. *Id.* at 77.

II. Analysis of Claims

A. Alternative Theories of Murder

The indictment charged the alternative offenses of intentional or knowing murder and depraved-indifference murder. Indictment. The petitioner argues that the presiding justice's failure to require the state to elect to proceed under one theory of murder or the other constituted reversible error. He bases this argument solely on Law Court precedent, Amendment to Petition for Writ of Habeas Corpus ("Section 2254 Petition") (Docket No. 6), attachment at 1-3, rather than on "the Constitution or laws or treaties of the United States," 28 U.S.C. § 2254(a). Accordingly, it is not cognizable on this section 2254 petition.

B. Sufficiency of Indictment

The portion of the indictment pertaining to depraved-indifference murder paraphrased the words of section 201(1)(B) by charging that "on or about the 5th day of December, 1978, in the County of Penobscot and State of Maine, Vinal R. Crocker . . . did engage in conduct which manifested a depraved indifference to the value of human life and which in fact caused the death of Timothy Crocker." Indictment. The petitioner claims that the indictment was insufficient to sustain his conviction.

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[4] (...continued)

> The defendant shall have the burden of proving, by a preponderance of the evidence, that he lacks criminal responsibility as described in subsection 1.

17-A M.R.S.A. § 58(1), (3), *recodified as amended at* 17-A M.R.S.A. § 39(1).

The sufficiency of an indictment is generally not open to inquiry in a habeas corpus proceeding. *Knewel v. Egan*, 268 U.S. 442, 446 (1925). "[H]abeas corpus can only be invoked with respect to indictments which are so fatally defective that under no circumstances could a valid conviction result from facts provable under the indictment." *Johnson v. Beto*, 383 F.2d 197, 198 (5th Cir.), *cert. denied*, 393 U.S. 868 (1968); *see Dukette v. Perrin*, 564 F. Supp. 1530, 1532 n.2 (D.N.H. 1983) (habeas corpus relief available where indictment is so defective as to deprive trial court of jurisdiction).

"[A]n indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense. *Hamling v. United States*, 418 U.S. 87, 117 (1974). An indictment may set forth the offense in the words of the statute itself as long as those words clearly set forth the elements of the offense. *Id.* In such cases the statutory language "must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged." *Id.* (quoting *United States v. Hess*, 124 U.S. 483, 487 (1888)).

The indictment does not specify what act manifested a depraved indifference to the value of human life. Thus, the petitioner argues, the indictment did not afford him information upon which he could prepare his defense. However, in addition to paraphrasing the words of section 201(1)(B), the indictment specified the victim and the approximate place and time of the alleged conduct manifesting depraved indifference. The indictment fairly informed the petitioner of the charge against him, and was not so fatally defective that no valid conviction could result from facts provable thereunder.

C. Constitutionality of Depraved-Indifference Murder Statute

The petitioner argues that section 201(1)(B) is unconstitutionally vague because an ordinary person would not be able to predetermine that a particular act would be a crime under section 201(1)(B). Although the petitioner challenged section 201(1)(B) on direct appeal under the United States and Maine Constitutions, Brief of Defendant-Appellant, Vinal Crocker ("Defendant's Brief") at 18, *State v. Crocker*, 435 A.2d 58 (Me. 1981) (No. Pen-80-6), he did not raise this issue before the presiding justice, *Crocker*, 435 A.2d at 62. Accordingly, the Law Court reviewed only for "obvious error affecting substantial rights." *Crocker*, 435 A.2d at 62. A federal habeas court may not review a federal question that the state court declined to reach due to the prisoner's procedural default, because such a decision rests on an independent and adequate state ground. *Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991). I need not decide whether the Law Court's decision on this issue rests on an independent and adequate state ground because the petitioner's constitutional claim fails on its merits.

"The void-for-vagueness doctrine reflects the principle that 'a statute which either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.'" *Roberts v. United States Jaycees*, 468 U.S. 609, 629 (1984) (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)) (alteration in original). A federal court considering a facial challenge to a state law must consider any limiting construction of that law provided by the state court. *Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1982). "One to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Parker v. Levy*, 417 U.S. 733, 756 (1974).

Although the Maine Legislature did not define the phrase "depraved indifference to the value of human life," the Law Court has given it some substance:

> [A] verdict of guilty of depraved indifference murder is appropriate where the accused's conduct, "objectively viewed, created such a high tendency to produce death that the law attributes to him the highest degree of blameworthiness." Put differently, death-producing conduct will justify a verdict of guilty of depraved indifference murder if a jury could find that the conduct was "so heinous in the eyes of the law as to constitute murder."

Crocker, 435 A.2d at 63 (quoting *State v. Lagasse*, 410 A.2d 537, 540 (Me. 1980) and *State v. Woodbury*, 403 A.2d 1166, 1173 (Me. 1979)).

Crystal Crocker, the petitioner's stepdaughter, testified that, three or four days before Timothy was taken to the hospital, the petitioner swung Timothy around by his feet and let him go headfirst into the wall, as punishment for stealing cookies. Transcript of Trial Proceedings (with jury) ("Trial Trans. I") at 796, 803-04, *State v. Crocker*, No. Pen-80-6 (Me. Super. Ct., Pen. Cty., Feb. 11, 1980). Throwing a five-year-old child in Timothy's emaciated state headfirst into a wall created a sufficiently high tendency to produce death, and was sufficiently heinous in the eyes of the law, to demonstrate a depraved indifference to the value of human life. Thus, the conduct proven at trial falls clearly within the scope of section 201(1)(B).

D. Jury Instructions

A claim that jury instructions violated state law may not form the basis for habeas relief. *Estelle v. McGuire*, 502 U.S. 62, 71-72 (1991). A federal court may grant habeas relief only if an erroneous instruction "by itself so infected the entire trial that the resulting conviction violates due process." *Id.* at 72 (quoting *Cupp v. Naughten*, 414 U.S. 141, 147 (1973)). The petitioner claims that the depraved-indifference murder instruction constituted reversible error, and that the

manslaughter instruction constituted manifest error. Section 2254 Petition ¶ 12(D) & attachment at 14. These purely state-law claims are not cognizable on this section 2254 petition.

E. Sufficiency of the Evidence

The petitioner claims that the evidence presented at trial was insufficient to support his murder conviction. Specifically, he claims that there was no evidence of intent or knowledge, or of death-producing conduct manifesting depraved indifference to the value of human life.[5] Presented with a sufficiency-of-the-evidence challenge to a state conviction, a federal habeas court must determine

> whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.

Jackson v. Virginia, 443 U.S. 307, 319 (1979) (citation omitted).

Crystal Crocker testified that, several days before Timothy was hospitalized, the petitioner swung Timothy around by his heels and let him go headfirst into a wall in order to punish him. Trial Trans. I at 803-04. From this testimony, as well as other testimony detailing the kinds of abusive punishments meted out to Timothy by the petitioner before this particular act occurred, the jury could have concluded either that the petitioner knew or intended that this act would cause death, or that this act manifested a depraved indifference toward the value of human life. Thus, the evidence presented at trial amply supported the petitioner's murder conviction.

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[5] The petitioner also argues that the state's entire case was based on the testimony of his eight-year-old stepdaughter, Crystal Crocker, who he claims was incompetent to testify and provided incredible testimony. Section 2254 Petition, attachment at 19. These purely state-law claims are not cognizable on this section 2254 petition.

F. Lack of Criminal Responsibility

17-A M.R.S.A. § 58 placed on the petitioner the burden of proving, by a preponderance of the evidence, that at the time of the murder he lacked criminal responsibility for his conduct by reason of mental disease or defect. 17-A M.R.S.A. § 58(1), (3), *recodified as amended at* 17-A M.R.S.A. § 39(1). Requiring a murder defendant to prove insanity as a defense, even beyond a reasonable doubt, does not violate due process. *Leland v. Oregon*, 343 U.S. 790, 798 (1952). The petitioner points out that depraved-indifference murder does not require any proof of the defendant's subjective mental status, whereas knowing or intentional killing necessarily involves proof of what the defendant knew or intended. Thus, he claims, applying section 58 to a defendant charged with depraved-indifference murder violated his right to due process by risking a conviction when it was as likely as not that he had no idea his act was wrongful. I find no authority supporting the petitioner's argument. On the contrary, so long as a state establishes all the facts necessary to prove the elements of the charged crime beyond a reasonable doubt, the state may require the defendant to prove an affirmative defense. *Patterson v. New York*, 432 U.S. 197, 210 (1977). Thus, application of section 58 in this case did not violate the petitioner's right to due process.

The petitioner next argues that the evidence presented in the second phase of his trial was sufficient to prove by a preponderance of the evidence that, at the time of the murder, he lacked the substantial capacity either to conform his conduct to the requirements of the law or to appreciate the wrongfulness of his conduct. "Before a federal habeas court undertakes to overturn factual conclusions made by a state court, it must determine that these conclusions are not 'fairly supported by the record.'" *Maggio v. Fulford*, 462 U.S. 111, 117 (1983) (quoting 28 U.S.C. § 2254(d)(8)). In making this determination the federal court may not substitute its own judgment as to the credibility

of witnesses for that of the state court. *Id.* at 113.

The presiding justice concluded that the petitioner failed to meed his burden of proving that he lacked criminal responsibility for his conduct. Transcript of Trial Proceedings (without jury) ("Trial Trans. II") at 314-15, *State v. Crocker*, No. Pen-80-6 (Me. Super. Ct., Pen. Cty., Feb. 21, 1980). David Anderson, M.D., testified that, based on his treatment of petitioner and on his review of the police reports and medical history, the petitioner was neither psychotic nor schizophrenic. *Id.* at 202, 209, 216, 218. He diagnosed the petitioner as having a hysterical personality, and testified that a person with a hysterical personality can control his mental and emotional processes. *Id.* at 220-21. Finally, he testified that during the week of November 24, 1978 the petitioner could control his mental and emotional processes and was aware of the consequences of what he was doing. *Id.* at 221-23. Based on this testimony, the presiding justice's finding that the petitioner failed to meet his burden was fairly supported by the record.

G. Competency to Stand Trial

The petitioner claims that the presiding justice violated his right to due process by erroneously finding him competent to stand trial. *See Pate v. Robinson*, 383 U.S. 375, 378 (1966) (conviction of accused while legally incompetent violates due process). Under Maine law a defendant is competent to stand trial if he is "capable of understanding the nature and object of the charges and proceedings against him, of comprehending his own condition in reference thereto, and of conducting in cooperation with his counsel his defense in a rational and reasonable manner." *Thursby v. State*, 223 A.2d 61, 66 (Me. 1966).

At a pretrial competency hearing the court heard testimony from four psychiatrists and a psychologist, two called by the state (psychiatrists David Anderson and Lawrence Salvesen), and

three by the defense (psychiatrists Irwin Pasternak and Epiphanes Balian, and psychologist William DiTullio). Transcript of Proceedings, Competency Hearing ("Hearing Trans.") at 2, 20, 29, 44, 70, *State v. Crocker*, No. CR-79-2 (Me. Super. Ct., Pen. Cty., Sept. 7 & Nov. 19, 1979). The petitioner's witnesses testified that he would have difficulty cooperating with his attorney and conducting his defense.[6] In contrast, the state's doctors testified that the petitioner was mentally capable of testifying and cooperating in his defense.[7] Even Dr. Pasternak, the petitioner's own witness, testified that the petitioner was mentally competent to testify in his own defense. *Id.* at 25. Although the witnesses found some risk that the petitioner would break down during some portions of his testimony, this possibility alone did not render the petitioner unable to conduct his defense. The evidence fairly supported the presiding justice's finding that the petitioner was competent to stand trial.

The petitioner also claims that the trial judge, *sua sponte*, should have conducted another competency hearing during the trial because the court "was aware of Vinal Crocker's mental condition and was aware of the high doses of medication and the potential effects of that medication." Section 2254 Petition, attachment at 31. A state court's failure to observe procedures

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[6] *See* Hearing Trans. at 22-24 (under stress situations could become psychotic, i.e., could misperceive proceedings, give wholly nonresponsive answers on witness stand, or become violent; would likely have significant difficulty responding to questions on stand, with long periods of sobbing), 46 (poor ability to cooperate in his defense because suspicious and paranoid), 52 (logical communication not possible with his lawyer concerning his story), 53 (could lose temper and become angry on stand), 78 (in courtroom setting would have significant difficulty functioning meaningfully in relation to his defense, would most likely be unable to say a word on the witness stand), 82 (denial of certain aspects of "his reality" would limit his ability to work with his attorney and develop defense strategies).

[7] *See id.* at 6-7, 12 (capable of cooperating with counsel on what he chooses to, and can coherently respond to questions from the witness stand "most of the time"), 32 (able to participate in his own defense with his counsel, although he might have trouble communicating during stressful situations).

adequate to protect a defendant's right not to be tried or convicted while incompetent violates his due process right to a fair trial. *Drope v. Missouri*, 420 U.S. 162, 172 (1975); *see Pate*, 383 U.S. at 385 (state violated defendant's right to fair trial by failing to invoke its own procedures requiring competency hearing where evidence raised bona fide doubt as to defendant's competency). A Maine trial court has a duty to order a competency hearing when it learns of a genuine doubt as to the defendant's competency. *See Thursby*, 223 A.2d at 68.

In the second phase of trial Dr. Balian testified that, eight days before the jury trial commenced, the petitioner "appeared to be calmer . . . than he had been previously," but "as the session progressed, he appeared to deteriorate further and further. He continued manifesting his irrational thinking. . . . He did not seem to be able to make a distinction in his mind between the different psychiatrists and what they might have said, . . . issues which are very significant to understanding his own legal status." Trial Trans. II at 26-27. He also testified that the petitioner "was still manifesting symptoms of schizophrenia and that he was in a psychotic state at the time of [his] evaluation; and even though he was on antipsychotic medications and he had been doing better yet under stress, he was showing rapid deterioration to a more acute state of psychosis and poor impulse control." *Id.* at 29-30. Although Dr. Balian observed that the petitioner "need[ed] to be on an antipsychotic in doses which would control his behavior and help modify his state," he recognized that the petitioner *was* on a dosage of an antipsychotic medication that was "appropriate in his condition." *Id.* at 30. Rather than raise doubts as to the petitioner's competence, this testimony fairly suggests that the medication was prescribed in a high enough dose to control the very symptoms that the petitioner claims rendered him incompetent.

The petitioner also suggests that he was suffering side effects from his medications. Although he was "possibly" having unspecified side effects from his antipsychotic medication, he

was receiving other drugs used to control side effects. *Id.* at 231-32. There is no suggestion in the record that these possible side effects could have affected his ability to understand the charges and proceedings against him and his own condition in reference thereto, or his ability to conduct his defense in a rational manner. The evidence was insufficient to raise a genuine doubt as to the petitioner's competence to stand trial.

H. Right to Fair and Impartial Jury

The petitioner claims that the presiding justice violated his right to an impartial jury by foreclosing his counsel from asking certain voir dire questions. Federal courts accord state trial courts particularly wide discretion concerning the propriety of voir dire questions. *See Mu'Min v. Virginia*, 500 U.S. 415, 424 (1991). The presiding justice foreclosed the petitioner's attorney from asking two questions that were similar to two others, which he permitted. Trial Trans. I at 206-08. This ruling was well within the presiding justice's discretion and did not undermine the petitioner's right to an impartial jury. The petitioner's attorney also proposed to ask: "If you found that someone did an act but that [sic] you found that there was no evidence on which to find that that person intended or knew what he was doing at that time, would you be able to find that person not guilty?" *Id.* at 208. The presiding justice properly excluded that question because a jury could find a defendant guilty of depraved-indifference murder without proof of intent or knowledge.

The petitioner next claims that the presiding justice's denial of numerous challenges for cause violated his right to an impartial jury. "[R]efusal to grant a challenge for cause is within the discretion of the trial court, and it does not provide a basis for habeas corpus relief unless the disqualifying fact was so prejudicial that the refusal deprived the petitioner of a fundamentally fair trial." *Sudds v. Maggio*, 696 F.2d 415, 416 (5th Cir. 1983). The petitioner claims that the jurors in

question should have been stricken for cause based on their exposure to pretrial publicity, particularly because four months before the petitioner's trial his wife was convicted of manslaughter in connection with Timothy's death. Although the jurors in question were familiar, in varying degrees, with the newspaper accounts of the case, they all provided sufficient assurances that they could decide the case impartially.[8] The fact for which the petitioner sought to strike these prospective jurors was not so prejudicial that the presiding justice's refusal to strike them deprived the petitioner of a fundamentally fair trial.

Third, the petitioner claims that the presiding justice should have dismissed the jury panel altogether due to conversation that took place in the jury room during voir dire. At the close of the first day of jury selection, the trial judge instructed the panel not to discuss the case with each other or anyone else. *Crocker*, 435 A.2d at 69. On the afternoon of the second day one panelist, Mr. Dunning, "revealed that he had overheard someone in the jury room that morning mention the name 'Mr. Crocker' and 'something about cigarette burns on a young child.' Mr. Dunning, however, answered that the overheard conversation would not affect his ability to sit impartially on the case; and neither counsel challenged him for cause." *Id.* The presiding justice denied defense counsel's

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[8] Mr. Cyr had heard about a child that had died from abuse, and had read that Martha Crocker had been sentenced to 20 years, although the judge wished he could do more. Trial Trans. I at 74-75. However, he stated that this knowledge would not affect his judgment. *Id.* at 75. Ms. Moulton's husband had started reading an article about a child who had died, but she asked him to stop because she doesn't like to hear about death of any kind. *Id.* at 100. Finally, Ms. Kennedy had read about the case when Martha Crocker was on trial and had formed an opinion as to Martha Crocker, but said she could put those facts and her opinion aside. *Id.* at 540. The defense removed Moulton, Cyr and Kennedy by exercising peremptory challenges. *Id.* at 406, 554.

Ms. Hurd knew that the child was five years old and that there was child abuse involved with the case; she also had a vague recollection of both parents having some connection with the death of the child, although she said her memory could be wrong on this point. *Id.* at 465-66. When asked if she could put her prior knowledge aside and base her decision on the evidence presented, Ms. Hurd said she "would make every effort" to do so. *Id.* at 467. She continued, "I feel I could, but, of course, any information that is in your mind you block out as much as you can but it is still there." *Id.* Ms. Hurd was ultimately seated on the jury. *Id.* at 554-55.

motion to dismiss the entire jury panel. *Id.* Defense counsel removed Mr. Dunning by exercising a peremptory challenge. Trial Trans. I at 406.

Thereafter, as each prospective juror was examined, the presiding justice permitted both counsel to inquire about remarks made in the jury room about the case.[9] *See* Trial Trans. I at 311. Having seated the full number of jurors necessary to enable both sides to exercise their remaining peremptory challenges, the presiding justice asked the potential jurors (except those who had already been individually examined concerning the jury-room remark) whether they had said or heard anything related to the facts of the case. *Id.* at 549-50. Mr. Martin responded affirmatively, and in response to individual examination he reported that an unknown woman on the panel had said to him, "I didn't think they would pick me because I told them I knew it was a child abuse case." *Id.* at 552. Mr. Martin was seated on the jury but was excused near the end of the trial due to an illness. *Id.* at 554, 1045-46.

Of the prospective jurors who reported overhearing the jury room remark, only Ms. Randall participated in the verdict. Despite overhearing a reference to a woman (undoubtedly Martha Crocker) serving time in connection with the death of her son, Ms. Randall clearly stated that this would not affect her ability to sit on the jury. Although it is regrettable that a few potential jurors

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[9] Only three of these jurors reported hearing any such remark. Mr. Berry said that he had heard potential jurors talk about "such things as the number of jurors that might -- potential jurors that had been picked . . . and this type of thing." Trial Trans. I at 350-51. Defense counsel unsuccessfully challenged Mr. Berry for cause on grounds unrelated to this conversation, but Mr. Berry was not ultimately seated as a juror. *Id.* at 354, 554-55. Ms. Wardwell overheard potential jurors talking about "where people were going, and when they will be back," but not about facts of the case. *Id.* at 457. Upon the state's motion Ms. Wardwell was excused for cause on grounds unrelated to the conversation. *Id.* at 459.

Ms. Randall said she heard potential jurors talking about a woman serving time in connection with the death of her son the prior fall, but also said that overhearing the conversation would not affect her ability to serve as a juror. *Id.* at 378-79, 383. Defense counsel did not challenge Ms. Randall for cause, and Ms. Randall was ultimately seated as a juror. *Id.* at 384, 554.

violated the presiding justice's explicit instructions, the matters discussed were not so prejudicial as to deny the petitioner his right to a fundamentally fair trial. *See Subilosky v. Scafati*, 294 F. Supp. 18, 19-20 (D. Mass. 1968) (rejecting habeas petitioner's claim where after four days of sequestration one venireperson disclosed that he was relative of murder victim, but voir dire established that jurors ultimately selected were free of prejudice).

Finally, the petitioner claims that the presiding justice erred by forcing him to exercise half of his peremptory challenges before the entire panel was selected. In order to reduce the number of potential jurors that would have to be sequestered, the presiding justice ordered both sides to exercise half of their peremptory challenges at the end of the second day of voir dire. *Crocker*, 435 A.2d at 70. On the third and final day of voir dire, only twelve jurors were passed for cause, whereupon the parties exercised their remaining peremptory challenges. *Id.* at 70-71. The defense had twelve peremptory challenges remaining. *Id.* at 71. Even assuming, *arguendo*, that the presiding justice's management of peremptory challenges is cognizable on a section 2254 petition, the petitioner was not prejudiced because his counsel had enough peremptory challenges remaining to strike all potential jurors passed for cause on the final day.

I. Testimony of Crystal Crocker

The petitioner claims that the presiding justice erred in permitting Crystal Crocker to testify because she was incompetent, and because the court erred in refusing defense counsel's request that the court, in determining Crystal Crocker's competency, consider prior inconsistent statements she had made concerning Timothy's death. This purely state-law claim is not cognizable on a section 2254 petition.

J. Evidentiary Rulings

"Habeas review does not ordinarily extend to state court rulings on the admissibility of evidence." *Puleio v. Vose*, 830 F.2d 1197, 1204 (1st Cir. 1987), *cert. denied*, 485 U.S. 990 (1988). An erroneous evidentiary ruling justifies habeas relief only where the ruling violated a specific constitutional provision or was so grossly prejudicial as to deny the petitioner due process of law. *Flores v. Minnesota*, 906 F.2d 1300, 1304 (8th Cir. 1990). Furthermore, on a habeas corpus petition a trial error is considered harmless unless the court finds that the error, considered in light of the entire record, had a "substantial and injurious effect or influence in determining the jury's verdict." *Levasseur v. Pepe*, 70 F.3d 187, 193 (1st Cir. 1995) (quoting *Brecht v. Abrahamson*, 123 L.Ed.2d 353 (1993)).

The petitioner asserts four due process challenges to the presiding justice's evidentiary rulings. Specifically, he challenges the introduction of (1) evidence of bruises, abrasions and burns not related to the cause of death; (2) photographs of Timothy while he was hospitalized in June 1978 and immediately preceding his death; (3) Dr. Lawsing's testimony that Timothy displayed injuries from abuse during his June 1978 hospitalization; and (4) Charles Amero's testimony regarding the petitioner's discipline of Timothy. Section 2254 Petition, attachment at 51-55; *see also Crocker*, 435 A.2d at 73-76.

As the Law Court recognized on direct appeal, all of this evidence was relevant to an ongoing pattern of child abuse, which tended to establish that the petitioner acted either intentionally or recklessly, or in a manner manifesting a depraved indifference to the value of human life, when he caused Timothy's death. *Crocker*, 435 A.2d at 73-76. Although the November photographs might be characterized as "gruesome," *id.* at 76, and the other evidence of abuse might be disturbing to an

average juror, I do not find the evidence so grossly prejudicial as to deny the petitioner his right to due process. *See Lisenba v. California*, 314 U.S. 219, 228-29 (1942) ("The fact that evidence admitted as relevant by a court is shocking to the sensibilities of those in a courtroom cannot, for that reason alone, render its reception a violation of due process.").

Finally, the petitioner claims that the exclusion of Amy Amero's testimony violated his Sixth Amendment right to confront the witnesses against him. Charles Amero had testified that the petitioner abused Timothy. Trial Trans. I at 762, 765. On cross-examination he denied ever hitting his ex-wife, Amy Amero. *Id.* at 771-72. The petitioner sought to have Amy Amero testify that Charles had hit her, thus discrediting him. *Id.* at 880.

In addition to Charles Amero, Crystal Crocker also testified that the petitioner abused Timothy. Trial Trans. I at 800, 804, 806-07 (the petitioner, *inter alia*, forced Timothy to take cold baths, put Timothy's hands in hot water, prohibited Timothy from taking meals, forced Timothy to stand spread eagle with hands against wall for an hour at a time and hit Timothy in the stomach). Assuming, *arguendo*, that refusal to permit impeachment on this collateral issue violated the petitioner's right to confront witnesses against him, it undoubtedly had minimal, if any, effect on the jury's verdict.

III. Conclusion

For the foregoing reasons, I recommend that the petition for a writ of habeas corpus be ***DENIED*** without a hearing.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 10th day of July, 1996.

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David M. Cohen
United States Magistrate Judge